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Supreme Court, U.S.
FILED
SEP 7 - 2004
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No. 03-633
(CAPITAL CASE)

In the
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center
Petitioner,

v.

CHRISTOPHER SIMMONS,
Respondent.

Petition for Writ of Certiorari
to the Missouri Supreme Court

REPLY BRIEF FOR PETITIONER

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ARGUMENT

In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court used a two-step approach to evaluate the acceptability of a particular punishment under the Eighth Amendment. After looking for legislative judgments of contemporary standards (*see id.* at 175 (plurality opinion)), the Court held that "[t]he Court also must ask whether [the punishment] comports with the basic concept of human dignity at the core of the Amendment," *id.* at 182. The Court said that it would reject any punishment that the Court, in its own judgment, found to "be so totally without penological justification that it results in the gratuitous infliction of suffering." *Id.* at 183.

In rejecting the second step, the Court in *Stanford v. Kentucky*, 492 U.S. 361 (1989), expressly declined to "rest constitutional law upon [the] uncertain foundations" of indicia other than legislative acts and jury verdicts. 492 U.S. at 377.

Despite what Simmons suggests by beginning his argument with what is, in essence, the invocation of the second *Gregg* step, the Court in *Atkins v. Virginia*, 536 U.S. 304 (2002), did not reinstate the *Gregg* approach. The Court began by searching for and finding a legislative consensus. 536 U.S. at 316. The Court then merely observed that the "consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty." *Id.* at 317. The Court did not suggest that such "judgment" and "relationship to penological purposes" have independent significance; they merely affirmed the rationality of the legislative consensus.

Here, as in *Stanford* and *Atkins*, the Court should look beyond evidence of a legislative consensus only to confirm the rationality of the consensus. It should not rest its holding on a body of untested legislative facts, assembled on appeal.

But even if the Court were to reassert the independent evaluative power it claimed in the second *Gregg* step, it should reverse the decision of the Supreme Court of Missouri. Not only is there not yet a legislative consensus for barring 17-year-olds from capital punishment, but Simmons has not shown that retaining the bar at 16 is "so totally without penological justification" (*Gregg*, 428 U.S. at 183) as to justify changing a judicially-created constitutional bar. Indeed, even the body of evidence selectively marshaled here by Simmons contains adequate support for the conclusion that the *Stanford* line is an appropriate one.

I.

The picture painted by legislative enactments and jury verdicts is not significantly different today than when the Court decided *Stanford*.

Legislation. Simmons contends that legislative action since *Stanford* paints a picture of a new consensus. He asserts that a "substantial number" of States (he says seven) have passed laws prohibiting the imposition of capital punishment on juvenile offenders. Resp. Br. 38. But as discussed in Petitioner's Brief at 22-24, only four state legislatures, representing less than 3% of the nation,[1] have passed such laws in the 15 years since *Stanford*. In *Coker v. Georgia*, 433 U.S. 584 (1977), the Court held that reinstatement by the legislatures of three States of capital punishment for a rape conviction was insufficient to show legislative acceptance of that punishment. *Id.* at 594 (plurality opinion). Similarly, here the recent experience of four States is insufficient to justify finding "such general legislative rejection of the execution of 16- or 17-year-

[1]United States Department of Commerce, Bureau of Census, Statistical Abstract of the United States (2000).

old capital murderers that a clear national consensus can be said to have developed." *Stanford*, 492 U.S. at 381-82 (O'Connor, J., concurring). And the experience of the four states is *very* recent; the oldest of these post-*Stanford* laws was enacted by Montana just five years ago (1999); Indiana enacted its law in 2002; and South Dakota and Wyoming enacted their laws only this year. Pet. Br. 22. "[I]t is myopic to base sweeping constitutional principles upon the narrow experience of the past five years." *Coker*, 433 U.S. at 614 (Burger, C.J., dissenting).

Simmons's fifth state is Washington. But there it was *State v. Furman*, 858 P.2d 1092 (Wash. 1993), not a legislative act, that set the line at age 18.

Simmons's sixth and seventh states are Kansas and New York.[2] Yet Simmons agrees that these states simply reaffirmed longstanding prohibitions – Kansas since 1935 and New York since 1963 – against imposing capital punishment on those who murder before age 18. Resp. Br. 39 nn. 79-80. *See also* Brief of New York *et al.*, 11, 14-15. Thus when this Court in *Atkins* spoke of states that had raised the minimum age for capital punishment, it did not include New York and Kansas, even though both had, since *Stanford*, returned capital punishment to their lists of available penalties. *Atkins*, 536 U.S. at 315 n.18.

When counting to seven, Simmons dismisses actions taken in Missouri and Virginia, neither of which had a minimum age for capital punishment before *Stanford*, *see* 492 U.S. at 381 (O'Connor, J., concurring), but both of which have now set the age at 16 by statute. *See* Pet. Br. 24-25; Resp. Br.

[2]Curious, in light of his decision to include Washington, is Simmons's failure to note that the New York Court of Appeals struck down the legislature's attempt to revive capital punishment as a violation of the state constitution. *See People v. Lavalle*, 2004 WL 1402516 (N.Y. June 24, 2004).

41 n.80. If by carrying over preexisting limits into new statutes New York and Kansas add to one side of the balance, Missouri and Virginia must add to the other.

Simmons also dismisses the action taken by voters in Arizona and Florida. Resp. Br. 41 n.85. But he ignores what motivated those voters.

In 1996, Arizona voters passed Proposition 102 to authorize the legislature to enact laws regarding juvenile proceedings. *State v. Davolt*, 84 P.3d 456, 479 (Ariz. 2004).[3] As discussed in Petitioner's Brief at 25-26, the purpose and effect of that amendment was to make offenders as young as 15 subject to adult penalties – which included capital punishment.

While the message sent by Florida voters is not as clear, no one can dispute that Floridians support the death penalty, and the circumstantial evidence suggests that this support extends to applying it to 17-year-old offenders. In 1994, the Florida Supreme Court struck a statute allowing the death penalty for a 15-year-old as a violation of the Florida Constitution's "cruel or unusual" punishments clause. *See Allen v. State*, 636 So.2d 494 (Fla. 1994).[4] In 1998 voters approved a constitutional amendment changing this clause to

[3]The court in *Davolt* held only that the state statute requiring any 15 to 17-year-old charged with murder to be automatically tried as an adult was unconstitutional under *Thompson v. Oklahoma*, 487 U.S. 815 (1988), because there was no provision for a prior, individualized assessment of the juvenile's maturity and moral responsibility at the time of the offense. *Davolt*, 84 P.3d at 481. But the court was quick to "emphasize" that it was not "preclud[ing] the State from seeking the death penalty against juvenile defendants." *Id.*

[4]The Florida Supreme Court had also narrowly rejected a claim that use of the electric chair was "cruel or unusual." *See Jones v. State*, 701 So.2d 76 (Fla. 1997).

read, "cruel and unusual." *See Brennan v. State*, 754 So.2d 1, 6 n.4 (1999) (holding that death sentence imposed on 16-year-old murderer was "cruel or unusual"); *Armstrong v. Harris*, 773 So.2d 7, 9 (Fla. 2000).[5] The Florida Supreme Court struck down this voter-approved amendment on procedural grounds in *Armstrong v. Harris*, then later relied on *Brennan* to set aside the death sentence imposed on a 16-year-old murderer because the sentence was "cruel or unusual." *See Ferrell v. State*, 772 So.2d 1218 (Fla. 2000). In 2002, the voters again approved the amendment, effectively reversing *Ferrell, Brennan*, and *Allen*.[6]

Even counting Kansas, New York, and Washington among the states that have raised the minimum age since *Stanford*, seven states are substantially fewer than the number this Court relied on to find a recently-developed consensus in *Atkins*: 18 States had legislatively barred imposition of capital punishment on mentally retarded defendants since *Penry v. Lynaugh*, 492 U.S. 302 (1989), and no State had passed any law to the contrary. *Atkins*, 536 U.S. at 314-16. The contrast with the record on minimum age was drawn by the Court itself. *Id.* at 315 n.18.

Jury verdicts. When Simmons addresses the other, more problematic, source of objective evidence of popular standards, jury verdicts (Resp. Br. 45), he relies heavily on a forthcoming article arguing that a very recent decline in the

[5]The text of the amendment also provided that the "death penalty is an authorized punishment" and that both the "cruel or unusual" and "cruel and unusual" clauses "shall be construed in conformity with decisions of the United States Supreme Court." *See Armstrong*, 773 So.2d at 16 n.25.

[6]Petitioner's opening brief (p. 26) refers to the 2002 vote. Simmons suggests that a reference to *Allen v. State* (instead of *Brennan v. State*) contained on that page was incorrect. Resp. Br. 41 n.85. But the 1998 vote in which the amendment was originally adopted occurred before *Brennan* was decided.

number of juvenile death sentences is evidence of "an emerging societal norm" against such executions. Jeffrey Fagan & Valerie West, *The Decline of the Juvenile Death Penalty: Scientific Evidence of Evolving Norms*, J. Crim. L. & Criminology (forthcoming Winter 2004).[7] But the authors concede that several factors – ones that either cannot be statistically measured or for which no statistics were available – affected their ability to make any far-reaching conclusion. *Id.* at 317. They admit that prosecutors' charging decisions are beyond the capability of social science to study. *Id.* at 7. They compare juvenile death sentences to the total number of homicide arrests, but fail to ask whether the homicides were capital offenses. *Id.* at 27, 30. They concede the absence of arrest data specific to 16- and 17-year-old offenders. *Id.* at 30 n.73. In short, they do not "indicate how many juries have been asked to impose the death penalty for crimes committed [at age 16 or 17], or how many times prosecutors have exercised their discretion to refrain from seeking the death penalty in cases where the statutory prerequisites might have been proved." *Thompson v. Oklahoma*, 487 U.S. 815, 853 (1988) (O'Connor, J., concurring in judgment).

Such statistics also fail to account for the inherently individual factual distinctions among cases with respect to the crimes themselves and the individual defendants. Ultimately, juries decide whether to impose a death sentence not based on their policy judgment concerning the death penalty for those who offend before turning 18, but on the facts of a particular case against a particular defendant. We still lack data that

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[7] Actually, the article confirms that that the number of juvenile death sentences fluctuates greatly, from highs of 18 (1994), 14 (1999), 13 (1995), and 12 (1996), to lows of 2 (2003), 4 (2002), and 5 (1991), *id.* at 16 – not the kind of consistent trend that Simmons suggests. And the authors concede that more juvenile death sentences have been imposed after *Stanford* than in the decade before it. *Id.* at 18 n.63.

would "allow [the Court] reliably to infer that juries are or would be significantly more reluctant to impose the death penalty on [16- or 17-year-olds] than on similarly situated older defendants." *Id.* (emphasis added).

II.

The untested collection of legislative facts that Simmons presents does not eliminate the rational bases for laws that conform to *Stanford*.

In his point I, Simmons essentially argues that the choice to make capital punishment available for a 17-year-old murderer is "so totally without penological justification" (*Gregg*, 428 U.S. at 183) that it cannot rationally be made by thoughtful legislators. Whether he means to ask that the Court revive the two-part *Gregg* approach, or merely that the Court confirm what Simmons sees as a new, post-*Stanford* consensus, the untested collection of publications he compiles – a collection more suited to legislative factfinding than to appellate decision-making – is insufficient. Indeed, that collection, particularly when expanded to include reports referenced within it, provides more than adequate support for affirming *Stanford* and permitting legislatures to retain capital punishment as an option for the jury's consideration when a 17-year-old commits a truly heinous crime.

"Adolescent." The inadequacy of Simmons's case begins with undefined use of "adolescence" – a term that "eludes precise characterization." L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 Neurosci. & Biobehav. Rev. 417, 419 (2000). "There are numerous physiological and socio-behavioral transitions that occur during the age span between childhood and adulthood, with the timing of these transitions varying according to nutritional status as well as sociocultural values and economic conditions in

humans." *Id.* Though some use ages 12-18 to roughly approximate "adolescence," "[t]here is less consensus as one approaches the 'gray zones' at the margins of this age range." *Id.* In fact, the "entire second decade is not in-frequently considered adolescence, and even ages up to 25 years have been considered as late adolescence by some researchers." *Id.* at 419 (citations omitted). To the extent adolescence is defined based on physiological development, its definition will be affected by ongoing research, such as recent studies using "magnetic resonance imaging (MRI) of cortex" showing that brain development does not "approximat[e] average adult levels until 20 years of age." *Id.* at 439. Thus when Simmons argues against capital punishment for "adolescents," we cannot be sure that his "evidence" would not demand a bright line at 20 or even 25.[8] More important, his imprecision – and that of many of his authorities – leaves the door open for legislators to choose 16 or 17, not just 18 or a higher age.

Adolescent decision-making. Studies of adolescent decision-making reach conflicting results – some of them supporting Simmons, others supporting legislatures that retain the *Stanford* line. The contrasting conclusions are demonstrated in amicus briefs filed by the American Psychological Association.

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[8]If "adolescence" ends near 18, many of Simmons's authorities fail to provide him specific support, for they compare younger-than-adolescent groups with older-than-adolescent ones, without giving useful data as to the critical middle ground. *See, e.g.*, studies comparing "children" with "adults" (B.J. Casey, et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 Bio. Psych. 241, 248-49 (2000)); comparing 6 children between 9 and 11 with 6 "adults" (*id.* at 247, 250); comparing 9 children, ages 7-12, with 9 young adults, ages 21-24 (*id.* at 250-51). The Cartron-Guerin study (cited in Jari-Erik Nurmi, *How do Adolescents See Their Future?: A Review of the Development of Future Orientation and Planning*, 11 Dev. Rev. 1, 19 (1991)) speaks of "older adolescents," but studied those aged 12-15.

Here, the Association argues that 17-year-olds are not sufficiently mature to be fully responsible for murder; the Association opposes capital punishment for anyone under age 18 because of their "[d]evelopmentally immature decision-making, paralleled by immature neurological development." Brief of APA, *et al.*, at 2. But the Association took a different position when addressing the availability of abortion to juveniles without parental involvement. In its amicus brief[9] in *Hodgson v. Minnesota*, No. 88-805, 497 U.S. 417 (1990), the Association pointed out that "[d]evelopmental psychologists have built a rich body of research examining adolescents' capacities for understanding, reason, solving problems and making decisions, especially in comparison to the same capacities in adults."[10] Based on that "rich body of research," the Association concluded that long before age 18, juveniles have the maturity to decide whether to obtain an abortion without parental involvement:

> Research consistently supports the conclusion that there is a predictable development during late childhood and early adolescence of the capacity to think rationally about increasingly complex problems and decisions.
>
> * * * *
>
> In fact, by middle adolescence (age 14-15) young people develop abilities similar to adults in reasoning about moral dilemmas, understanding social rules and laws, [and] reasoning about interpersonal relationships and interpersonal problems . . . . Thus by age 14 most adolescents have developed adult-like intellectual and social capabilities including specific abilities outlined in the law as necessary for understanding treatment alternatives, considering risks and benefits, and giving

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[9]Available at 1989 WL 1127529.

[10]*Id.* at 23.

legally competent consent.

Id. at 23-24 (footnotes omitted).

Also referring to that "rich body of research," Gary B. Melton pointed out that "existing literature clearly suggests that, for most purposes, adolescents cannot be distinguished from adults on the ground of competence in decision making alone," and "that ages 11 to 14 should be viewed as a transition period in the development of important cognitive and social abilities; youth in this age group might be competent as decision makers in some contexts." Gary B. Melton, *Toward "Personhood" for Adolescents,* Am. Psychologist 99, 100 (Jan. 1983). Lita Furby and Ruth Beyth-Marom describe a study showing "that 14-year-olds could not be distinguished from adults on such competency criteria as evidence of choice, reasonable outcome of choice, reasonable decision-making process, and understanding of facts." Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 Developmental Rev. 1, 10-11 (1992). L.P. Spear points out that "[e]arly adolescence in humans is associated with a major transformation of cognitive thought leading to abstract reasoning." Spear, *supra,* at 423. She confirms that there is only a "small difference in decision making capacity between individuals from mid-adolescence onward." *Id.*[11]

Elizabeth Cauffman and Lawrence Steinberg point to a dearth of evidence in that "rich body of research" to support Simmons's argument that there is no longer a rational basis for

[11]Some of the differences researchers have found among groups are based on gender (Alan S. Waterman, *Identity Development From Adolescence to Adulthood: An Extension of Theory and a Review of Research,* 18 Dev. Psych. 341 (1982)), or even economic status (*see* Baruch Fischhoff, *Risk-Taking: A Developmental Perspective in Risk Taking Behavior* 133, 148 (J.F. Yates ed. 1992)), rather than age.

Stanford line: "[T]here, is little evidence that growth in the logical abilities relevant to decision-making occurs in any systematic way much past age 16." Elizabeth Cauffman & Laurence Steinberg, *(Im)Maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable Than Adults,* 18 Behav. Sci. & L. 741, 744 (2000) (citation omitted). "Overall, there is little evidence from studies of *cognitive* development to support the assertion that adolescents, once they have turned 16, should be viewed as less culpable than adults." *Id.* (emphasis in original).

Ultimately, Simmons wants the Court to declare that the *Stanford* line is now "without penological justification" not based on research that uniformly reaches that conclusion, but based on inconsistent research, viewed through the lense of a stereotype that the American Psychological Association decried in *Hodgson*: "[T]he assumption that adolescents as a group are less able than adults to understand, reason and make decisions about intellectual and social dilemmas is not supported by contemporary psychological theory and research." 1989 WL 1127529 at 26. He fails to recognize that the "significant numbers of psychosocially mature *and* immature adolescents suggest that it is imperative to consider individual differences, rather than simply age, when assessing decision-making ability or maturity of judgment among adolescents." Cauffman & Steinberg, *supra,* at 757 (emphasis in original). But that is precisely what legislatures in Missouri and elsewhere have recognized, though that recognition has led, so far, to mixed results.

Adolescents as risk-takers. "Although there is little empirical research on adolescent decision making and risk taking, there is no paucity of beliefs about how to characterize adolescent behavior in these areas." Furby & Beyth-Marom, *supra*, at 9. One researcher described such beliefs as "an established bit of folk wisdom." Fischhoff, *supra,* at 133. But

because the existing evidence does not support the contention that adolescents are prone to "irrational" risky behavior, that contention cannot bar legislatures from setting the minimum age at 16.

Some of the perception of adolescents as risk-takers is the result of applying adult paradigms. One researcher "used decision making theory to explore risk taking in adolescence" and "concluded that risk taking during adolescence represents 'an optimal life-span pattern for a rational decision maker who must gain knowledge of self and environment through experience.'" Spear, *supra,* at 422. In other words, it is rational for adolescents to experiment to a degree greater than adults, to gain knowledge and experience. Moreover, the risks of some behaviors are rationally less during adolescence than later; behavior that would be irrational for an adult may be rational for an adolescent, and vice versa.

Again, it is not that adolescents are ignorant of risks. "In fact, there is substantial evidence that adolescents are well aware of the risks they take...." Cauffman & Steinberg, *supra*, at 744. Cauffman and Steinberg expressly reject the premise "that, as a class, adolescents are irresponsible, solipsistic, or reckless in any absolute sense." *Id*. at 757. They remind us that "responsibility, perspective, and temperance – the three components of maturity of judgment... – are more predictive of antisocial decision-making than chronological age alone," and observe that "psychosocially mature 13-year-olds demonstrate less antisocial decision-making than psychosocially immature adults." *Id*. Standing alone, that conclusion would not justify lowering the *Stanford* line. But it adds to the reasons to retain it.

Emotional control. Simmons suggests that adolescents' moodiness casts doubt on their ability to make rational decisions. Resp. Br. at 18-19 & n. 25. His evidence for that claim

is a 1980 report. And that report itself suggests limits on the "moody" characterization: "Recent research has cast doubt on the image of the adolescent years as a period of turmoil. The evidence for emotional turmoil suggests that it occurs in early adolescence and is confined to girls." Reed Larson et al., *Mood Variability and the Psychological Adjustment of Adolescents,* 9 J. Youth & Adolescence 469, 487 (1980). Again, legislators could reasonably conclude that by exempting those in "early adolescence" from capital punishment, they have excluded the class of those who are subject to emotional turmoil to a degree that merits differential treatment.

Neurological research. To the extent Simmons points to insights gained from a new, post-*Stanford* body of research, he points to recent studies of physical brain development made possible by the increasing sophistication of magnetic resonance imaging (MRI). But missing is compelling, specific proof of the connection between the MRI results and behavioral maturity. That the brain and behavior both change during any portion of adolescence does not prove a connection; "correlated developmental events cannot be used to infer causality." Spear, *supra,* at 439.

The Court should not accept at face value Simmons's sweeping assertions of such connections; the authorities that Simmons cites are often far less definitive. Among those assertions is his statement that a particular "shift in the composition of the brain helps the brain work faster and more efficiently." Resp. Br. 22. To support this particular statement, Simmons cites B.J. Casey et al., *Structural and Functional Brain Development and its Relation to Cognitive Development*, 54 Bio. Psych. 241 (2000), and includes in a parenthetical a correct but more limited statement: "myelination and synaptic pruning '*coincide* with the continued development of cognitive

capacities.'" Resp. Br. 22 n.41 (emphasis added.)[12] Again, to "coincide" is not enough.

Moreover, the Casey text itself is an example of the uncertainty of many of the conclusions Simmons relies upon. Unlike Simmons, Casey consistently uses qualified terms: "the prefrontal cortex and related circuitry *have been implicated*"; "evidence of prolonged development...*may suggest* an important parallel"; "processes *may* represent." Casey, *supra*, at 245-46 (emphasis added).

Another of Simmons's authorities, referring to the key element of cognition, explains that connections between brain development and mental ability are merely "assumed," for "little is known in children and adolescents about the specific relationship between these structural changes [in the brain] and cognition." Robert F. McGivern et al., *Cognitive Efficiency on a Match to Sample Task Decreases at the Onset of Puberty in Children*, 50 Brain & Cognition 73, 73-74 (2002).[13] Such assumptions may be appropriate bases for legislative choices, but not for judicial ones.

Peer pressure. It is certainly curious that a man who himself led a peer to commit a heinous, premeditated murder would claim that legislators cannot rationally apply capital punishment to him because adolescents generally are peer-influenced. But that claim would be a weak one regardless: it

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[12]Spear refers specifically to the "pruning" that captures Simmons's imagination. Resp. Br. 21. But Spear does not project that "pruning" into the period between the *Stanford* rule and the one Simmons desires: "this pruning . . . appears to occur largely after 7 years and prior to 16 years of age." Spear, *supra*, at 439.

[13]McGivern further points out that some studies connect cognition and puberty (*id.* at 86-87) – pointing again to a period within the *Stanford* rule.

is based not on proven fact, but on the "myth of adolescent peer culture." Furby & Beyth-Marom, *supra*, at 23 (quoting F. Elkin & W.A. Wesley, *The Myth of the Adolescent Peer Culture*, 20 Am. Soc. Rev. 680-84 (1955)). Myths cannot be a basis for barring legislatures from weighing uncertain and inconsistent research. And actual research into "real-life decision making question[s] the degree to which adolescents are more peer-conforming than other ages." Furby & Beyth-Marom, *supra*, at 22.

Certainly "adolescents may care very much what their peers think of them." *Id.* at 23. But the question cannot be merely whether 17-year-olds care what peers think; it must be whether they are so likely to *act* based on peer influence that they should not be held fully responsible for their actions. "In most studies, perception of influence has been measured, but actual influence of behavior has not been assessed." *Id.* And where behavior has been studied, it does not necessarily follow peer influence. *See id.*

That youth generally are in "a time and condition of life when a person may be most susceptible to influence (*Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982), cited in Resp. Br. 24) did not not justify declaring every 17-year-old exempt from capital punishment in *Stanford*; nor can it do so today. Not all juveniles are in positions where such influences play a significant role. And particularly not those as old as Simmons: "Relevant empirical work includes laboratory evidence that conformity peeks at early adolescence" (Furby & Beyth-Marom, *supra*, at 22), *i.e.*, well before age 17.

Character. Claiming that capital punishment should not be available until a murderer's "character" or "identity" are fully formed, Simmons refers to Justice O'Connor's concurring opinion in *California v. Brown*, 479 U.S. 538, 544-46 (1987). Resp. Br. 26. But Justice O'Connor's statement about the need

to evaluate "the defendant's background and character" was made to ensure "individualized assessment" (*id.* at 545) not to preclude it. And to preclude it as to 17-year-olds would be particularly curious because the research on the formation of "character" and "identity" do not (and perhaps cannot, given the imprecision of the terms) establish when "character" or "identity" is formed. One authority Simmons cites suggests that even 18 is premature, concluding that "[i]t is during the college years that the greatest gains in identity appear to occur." Waterman, *supra,* at 348. Other research, by contrast, shows that one type of character – antisocial personality disorder – "is fixed sometime before age 18." Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy,* 100 Psych. Rev. 674, 684 (1993). Legislators may rationally fix upon the establishment of personality disorders in mid-adolescence, rather than defer all adult punishment until the mid-20's on the theory that character is still unformed.

Individualized assessment. Forced to concede that some 17-year-olds have capacity to match that of culpable adults, Simmons maintains that "individualized assessment," though required elsewhere to identify those who should be subject to the most severe penalties, is uniquely incapable of addressing juveniles charged with capital crimes. His argument is difficult to reconcile with *Atkins*, which is premised on the ability of courts and juries to make such assessments.

And identifying the "particularly precocious adolescent" (Resp. Br. 30) for whom Simmons implicitly concedes capital punishment is constitutionally available is not significantly more difficult than identifying others who commit crimes and are tried years later, after physical or mental changes. Simmons's argument belittles the ability of jurors, all of whom have experience as teenagers. Certainly, jurors must look back at facts that occurred when the defendant was – and appeared –

younger. But that is no harder than looking back at the mental condition of one who claims to have been insane at the time of the crime, but who has regained competence.

Simmons claims that individualized assessment is problematic for juveniles because the assessment may consider confessions, and adolescents are more likely than adults to falsely confess to crimes. Resp. Br. 32 & n.66. But his evidence is not persuasive; the premise has not been rigorously tested. *See* Alison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 L. & Hum. Behav. 141, 142 (2003) ("whether younger suspects are more likely than older suspects to falsely admit guilt has not been scientifically determined"). Indeed, "it is difficult, if not impossible, to conduct ethical, scientifically sound research on false confessions to actual criminal acts." *Id.* The study that Simmons cites tested whether adolescents were likely to falsely take responsibility for near-trivial mischief. *Id.* at 142-43. Its authors recognize that juveniles may have falsely confessed "because of the nonseriousness of the situation"; the seriousness of the situation plays a role in an adolescent's reaction to a false suggestion of responsibility. *Id.* at 152-53.

And Simmons cites no support for his implicit claim that all adolescents are affected by this or any other deficiency in their reaction to police inquiry. As Justice O'Connor recently observed, "17 ½-year-olds vary widely in their reactions to police questioning, and many can be expected to behave as adults." *Yarborough v. Alvarado,* 124 S.Ct. 2140, 2152 (2004) (O'Connor, J., concurring). That some behave incorrectly in some circumstances cannot be an adequate basis for barring individualized determinations of their maturity.

Age 18 as a bright line. At the conclusion of his point, Simmons leaves the realm of uncertain, qualified, and

conflicting legislative facts. But by concluding his point with a recitation of other areas where legislatures have chosen 18 as a bright line (Resp. Br. 35-36), Simmons implicitly highlights the fact that none of his psychological and physiological authorities or arguments justify that particular line.

And looking at such other statutes, setting minimum ages for granting privileges, provides little enlightenment. We do not know precisely what prompts legislators to pick 15 or 16 for driving, or 18 or 21 for drinking. But it seems obvious that legislators draw bright lines largely for administrative convenience – because they deem many privileges simply not to be worth the cost and complexity of "individualized assessment." As the science evolves – or perhaps even the maturation patterns of youth change (*see* Elkhonon Goldberg, *The Executive Brain: Fontal Lobes and the Civilized Mind*, 145 (2001)) – legislatures may set such lines at different ages. But based on current knowledge, legislatures can rationally conclude that for capital punishment, the bright line should be set at 16, and that beyond 16 the question is too defendant - and fact-specific to remove it from the hands of juries.

The Atkins *contrast.* Of course, Simmons would prefer this entire discussion; he, like the Missouri Supreme Court, would simply equate juveniles with the mentally retarded and demand the protection granted in *Atkins*. But the two groups differ at the outset by virtue of how they are defined.

The "mentally retarded" whose sentencing is ruled by *Atkins* consist "by definition" only of those with "diminished capacities to understand and process information, to communicate, to abstract from mistakes, to control impulses, and to understand the reactions of other." *Atkins*, 536 U.S. at 318. That group is thus defined by the very criteria that make the application of capital punishment to them "without penological justification" (*Gregg*, 428 U.S. at 183). There can

never be a member of that group for whom capital punishment would be appropriate.

Juveniles, by contrast, are defined solely on the basis of age – at the very most a rough proxy for maturity. *See* Joseph L. Hoffmann, *On the Perils of Line Drawing: Juveniles and the Death Penalty*, 40 Hastings L.J. 229, 258 (1989). As observed in one of Simmons's authorities, studying youth from "a developmental perspective...reveals the inherent inadequacy of policies that draw bright-line distinctions between adolescence and adulthood. Indeed, an analysis of the developmental literature indicates that variability among adolescents of a given chronological age is the rule, not the exception." Cauffman & Steinberg, *supra*, at 759.

It may be that "the age differences observed" in decision making abilities "are *appreciable* enough to warrant drawing a legal distinction. They may not, however, be *consistent* enough, since significant numbers of adolescents exhibit high enough levels of maturity of judgment to outperform less mature adults." Cauffman & Steinberg, *supra*, at 758 (emphasis in original). Again, those "significant numbers of adolescents" give legislators a sufficient penological justification for retaining capital punishment as a sentencing option for those who commit the most heinous crimes shortly before turning 18.

CONCLUSION

For the reasons stated above and in Petitioner's Brief, the decision of the Supreme Court of Missouri should be reversed.

Respectfully submitted,

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